Department of Labor

Board of Alien Labor Certification Appeals
800 K Street, NW, Suite 400-N
Washington, DC 20001-8002

(202) 693-7300
(202) 693-7365 (FAX)

Issue Date: 17 January 2007

BALCA Case No.: 2006-INA-00023
ETA Case No.: P2003-CA-09542302/JS

In the Matter of:

SCORE AMERICAN SOCCER CO.,
Employer,

on behalf of

TERESA ESPINOZA DE MARTINEZ,
Alien.

Certifying Officer: Martin Rios
San Francisco, California

Appearance: Andres Z. Bustamante
Los Angeles, California
For the Employer and the Alien

Before: **Burke, Chapman and Vittone**
Administrative Law Judges

DECISION AND ORDER

PER CURIAM. This case arises from an Employer's request for review of the denial by a U.S. Department of Labor Certifying Officer ("CO") of its application for labor certification. Permanent alien labor certification is governed by Section 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A), and Title 20, Part 656 of the Code of Federal Regulations ("C.F.R.").[1] We base our decision on the record upon

1 This application was filed prior to the effective date of the "PERM" regulations. *See* 69 Fed. Reg. 77326 (Dec. 27, 2004). Accordingly, the regulatory citations in this decision are to the 2004 edition of the Code of Federal Regulations published by the Government Printing Office on behalf of the Office of the Federal Register, National Archives and Record Administration, 20 C.F.R. Part 656 (Revised as of Apr. 1, 2004), unless otherwise noted.

which the CO denied certification and the Employer's request for review, as contained in the appeal file ("AF"), and any written arguments. 20 C.F.R. § 656.27(c).

STATEMENT OF THE CASE

On March 9, 2001, Score American Soccer Co., ("Employer") filed an application for labor certification to enable Teresa Espinoza de Martinez ("Alien") to fill the position of "Garment Inspector." (AF108). The only requirement for the job was three years of experience in the job offered. (AF 39, at Item 14). The job was described as: "Inspects garments for defects in sewing, knitting, or finishing prior to the application of logos and numbers. ..." (AF 63, at Item 13).

Several U.S. workers applied for the job. The Employer sent letters to applicants that stated:

> Dear [applicant]:
>
> Thank you for your letter regarding the job opening.
>
> Please call us to set up an interview if you are still interested at (310) 830-6161.
>
> Please be advised that you will be required to show proof that you meet the minimum requirements of the position and of Legal Residence in the United States at the time of the interview.
>
> If we do not hear from you by December 19, 2002 we will assume that you are no longer interested in this position and your name will be removed from our applicant list.
>
> Very truly yours,
>
> Rose Cursage

(AF 13, 17, 21, 25, 29).

On April 27, 2005, the CO issued a Notice of Findings ("NOF") proposing to deny certification under 20 C.F.R. § 656.21(b)(6) on the ground, *inter alia*, that the Employer neglected to pursue a qualified U.S. worker in good faith. (AF 58). Specifically, the CO questioned whether the contact letters sent to the qualifying applicants were discouraging and whether they adequately identified the job offer.

The Employer filed rebuttal by letter dated May 20, 2005. (AF 43). The Employer argued that it sufficiently followed-up the applicant's resume with acceptable letters prepared by a certification and immigration agent.

The CO issued a Final Determination denying certification on August 31, 2005. (AF 35). Among other grounds, the CO found that the Employer's contact letter lacked identification of the available position and contained information requests that applicants may have found discouraging.

The Employer filed a Request for Review by the Board on September 22, 2005. (AF 2). On appeal, the Employer argues that the State Workforce Agency and the CO failed to provide evidence that the U.S. applicant had been discouraged by the Employer during the recruitment process or possessed the minimum requirements for the garment inspecting position. The Employer also alleges a conspiracy headed by the State Workforce Agency against the Employer's rights.

DISCUSSION

An employer must show that U.S. applicants were rejected solely for lawful job-related reasons. 20 C.F.R. § 656.21(b)(6). Furthermore, the job opportunity must have been open to any qualified U.S. worker. 20 C.F.R. § 656.20(c)(8). Therefore, an employer must take steps to ensure that it has obtained lawful job-related reasons for rejecting U.S. applicants, and not stop short of fully investigating an applicant's qualifications. Although the regulations do not explicitly state a "good faith" requirement

in regard to post-filing recruitment, such a good faith requirement is implicit. *H.C. LaMarche Enterprises, Inc.*, 1987-INA-607 (Oct. 27, 1988). Actions by the employer which indicate a lack of a good faith recruitment effort, or actions which prevent qualified U.S. workers from further pursuing their applications are thus a basis for denying certification.

An Employer who by its actions made it sufficiently difficult for the applicants to obtain an interview so as to discourage them from pursuing the job opportunity has not shown a good faith effort to recruit U.S. workers, and has not established lawful, job-related reasons for rejecting U.S. workers. *Budget Iron Work,* 1988-INA-393 (Mar. 21, 1989) (en banc). Thus, for example, in *Budget Iron Work,* 1988-INA-393 (Mar. 21, 1989) (en banc), the Board held that where an employer failed to include its name or phone number on the contact telegrams, and misspelled the contact person's name, such a contact amounted to a lack of good faith effort to recruit. Similarly, the Board has held that an employer should not screen applicants to determine their immigration status prior to an interview. Rather, an employer must interview apparently qualified applicants first, at which time the immigration status can be reviewed, since prescreening has the potential of discouraging qualified applicants. *Oriental Healing Arts Institute*, 1993-INA-75 (Sept. 26, 1994); *Percy Solotoy*, 1992-INA-331 (Nov. 29, 1993). Moreover, an employer does not recruit in good faith where it places the burden on applicants to contact the employer rather than actively recruiting. *Viva of California*, 1987-INA-583 (Nov. 20, 1987) (en banc).

In the instant case, the letter used to contact the applicants did not provide any indication of what job the Employer was contacting the applicants about. It neither provided the name of the business or the fact that the letter was about an opening for a garment inspector.

In addition to the barrier of not identifying the name of the Employer or the job opening, the letter placed the burden on the U.S. applicant to call to arrange for an interview, required proof of minimum qualifications for the job, and sought proof of legal

residence. Given these circumstances, the CO properly found that the Employer failed to establish a good faith effort to contact the U.S. applicant at issue.

The Employer argued on appeal that the CO had not proved that the U.S. applicant had been discouraged by the Employer during the recruitment process or possessed the minimum requirements for the garment inspecting position. The burden of proving that a U.S. worker was pursued in good faith, however, rests squarely on the shoulders of the petitioning employer, not the CO. *Information Industries, Inc.*, 1988-INA-82 (Feb. 9, 1989) (en banc).

The Employer also argued on appeal that there was a conspiracy against the Employer concerning the recruitment and hiring process. The Employer provided no proof to support these allegations, and we find that they are warrantless and completely without merit.

Based on the foregoing, we find that the CO properly denied labor certification.

ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED**.

Entered at the direction of the panel by:

A

Todd R. Smyth
Secretary to the Board of
Alien Labor Certification Appeals

NOTICE OF PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within twenty days from the date of service a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of Board decisions; or (2) when the proceeding involves a question of exceptional importance. Petitions for review must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W.
Suite 400 North
Washington, D.C., 20001-8002.

Copies of the petition must also be accompanied by a written statement setting forth the date and manner of that service. The petition must specify the basis for requesting review by the full Board, with supporting authority, if any, and shall not exceed five double-spaced typed pages. Responses, if any, must be filed within ten days of service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of a petition the Board may order briefs.